IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 33 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MAGANBHAI CHHAGANBHAI BARIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 33 of 1999

MR PM THAKKAR, Sr. Counsel for M/S THAKKAR ASSOC. for Petitioner No. 1-4

MR BY MANKAD, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 07/08/2001

ORAL JUDGEMENT

The appellants - accused have filed this appeal against the judgement and order of conviction and sentence dated 25.11.1998 passed by the learned Additional Sessions Judge, Vadodara in Atrocity Case No.

36 of 1996.

All the appellants accused were found guilty for the offence under Section 363 IPC of kidnapping prosecutrix Pushpa and sentenced to suffer 5 years RI and to pay a fine of Rs. 500, in default to further undergo 60 days SI. Except accused - appellant No.2 Ramanbhai Sukhabhai Bariya, all the three remaining accused were also found guilty for the offences under Sections 366 and 376 IPC for abduction of prosecutrix Pushpa and committing rape on her. All the three accused were sentenced to suffer 7 years RI and to pay a fine of Rs. 500, in default to further undergo 2 months SI. All the accused have also been convicted for the offence under Section 3(1)(10) of the Atrocities Act and to suffer six months RI and to pay a fine of Rs. 500, in default to further undergo one month SI. All the aforesaid sentences were ordered to run concurrently.

It may be stated that accused No.2 Ramanbhai Sukhabhai Bariya has been acquitted by the learned Judge for the offences under Sections 366 and 376 IPC.

Bhailalbhai, P.W.1 Ex.11 is the complainant. He filed the complaint before the Police on 2.9.1995 against accused Maganbhai Chhaganbhai Bariya, Ramanbhai Sukhabhai Bariya, Muljibhai Koyajibhai Bariya and Dineshbhai Mangubhai Bariya for the offences of kidnap, abduction and rape of his daughter Pushpa on 29.8.1995. He is an Adivasi belonging to Scheduled Tribe. He has not supported the prosecution and turned hostile. Therefore, with the permission of the Court, he was cross-examined by the learned Public Prosecutor when he has denied the suggestion made to him by the learned PP that accused were from his village and there was compromise and therefore, with a view to save them he is falsely deposing before the Court. He was thereafter cross-examined by the defence Counsel wherein he had stated that he was advised by the village people to file complaint, so that he get money from Social Welfare Department, as they belong to Adivasi community. He has also admitted that at the instance of village people he gave the names of the accused persons in the complaint.

Similarly, prosecutrix Pushpa, P.W.2 Ex.13 has also not supported the prosecution and practically turned hostile. She has admitted in her cross-examination made by the defence Counsel that against her will she was got married with Arvind. She has clearly stated that prior to her marriage, she had love affairs with accused No.1 Maganbhai Chhaganbhai Bariya and even after her marriage,

their relations continued. She has also stated that she was not liking her husband Arvind and therefore, she has never allowed him to sleep with her. She has clearly stated in her cross-examination that after remaining present before the Sankheda Police Station, she refused to go either to her parents' house or to her in-laws's house and therefore, she was sent to Nari Suraksha Kendra, as she wanted to go with accused Maganbhai Chhaganbhai Bariya. She has also admitted that she asked accused Maganbhai Chhaganbhai Bariya to take her with him and therefore, Maganbhai took her with him. They moved around together for three days, but Maganbhai had never any sexual intercourse with her. She had never complained about kidnapping, abduction or rape to anyone else during the period of these three days. She had named accused Dineshbhai and Muljibhai in her Police statement on the say of village people, but they had never gone with her, nor they have committed any rape on her.

It is surprising that inspite of this evidence of the prosecutrix and the complainant, the learned Judge accepted the prosecution case against all the accused for the offence under Section 363 IPC and except accused No.2, remaining accused for the offences under Sections 366 and 376 IPC and also convicted them for the offence under Section 3(1)(10) of the Atrocities Act, on the ground that prosecutrix was a minor girl. It has clearly come on record that she was not minor, but major. As per her own evidence, she was 19 years old and the medical evidence also clearly rules out that she was below 18.

It is true that she was examined by the doctor and doctor stated that there was sexual intercourse but even assuming for the sake of argument that there was sexual intercourse, but that does not mean that accused Maganbhai or any other accused committed rape on her. It is clear from her evidence before the Court that she left the custody of her father on her own will and rather at her insistence, accused No.1 Maganbhai took her away with him. Even if there was a sexual intercourse, it cannot be said to be a rape, but at the most it was a sexual intercourse with consent of the girl. The very fact that she had stated in her cross-examination that she had love affairs with accused No.1 Maganbhai prior to her marriage with Arvind and even thereafter, it shows that false case was filed by the father of the prosecutrix before the Police only with a view to extract money from the Government because being Adivasi belonging to Scheduled Tribe, they would be entitled for some compensation whenever they file such complaint.

In view of the above discussion, there is no option for this Court but to allow this appeal. Accordingly, this appeal is allowed. The impugned judgement and order of conviction and sentence passed by the learned Additional Sessions Judge, Vadodara in Atrocity Case No. 36/96 is hereby quashed and set aside and all the accused are ordered to be set at liberty forthwith, if they are not required in any other case. They are on bail. Therefore, their bail bonds stand cancelled. Fine, if paid, to be refunded.

(B.J.Shethna, J.)

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